

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TINA K. OWSLEY

Claimant

VS.

U.S.D. #501

Self-Insured Respondent

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Docket No. 1,027,939

ORDER

The self-insured respondent requests review of the May 5, 2006 preliminary hearing Order For Medical Treatment entered by Administrative Law Judge Brad E. Avery.

ISSUES

The Administrative Law Judge (ALJ) found the claimant's fall on the sidewalk outside of the school building where she worked arose out of and in the course of employment with the respondent. The ALJ noted that neutral risks or unexplained falls are compensable; that injuries while going and coming are compensable if travel is an intrinsic or required to complete some special purpose trip and that at the time of the fall the claimant was still providing a service to her employer. Consequently, the ALJ ordered respondent to pay for medical treatment with Dr. Polly.

The respondent requests review of whether the claim is compensable. Respondent argues the "going and coming" rule should apply in this case.

Claimant argues carrying the notebooks home was incidental to her work and because she had only one arm to break her fall her risk of injury was increased. Consequently, claimant requests the Board to affirm the ALJ's Order For Medical Treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The claimant has been a teacher of deaf children for 22 years at Whitson Elementary School. She normally worked from 7:45 a.m to 5:00 p.m. She testified that

about three nights a week she would take work home. On February 14, 2006, the claimant was heading to her car with several notebooks in her left hand as well as her purse and lunch bag when she fell hitting her right elbow and hand on the concrete public sidewalk. The claimant sustained a break to the head of the radius and underwent surgery to replace the head with a prosthesis.

The claimant agreed she was walking on a public sidewalk when she fell forward but did not know what caused her to fall. When she fell she braced herself with her right hand because she had the notebooks in her left hand. Claimant noted she was simply leaving work for the day and planned to later prepare at home for a presentation she was making the next afternoon. And claimant noted that she parked out on a public street across from the school instead of in the respondent's parking lot.

The "going and coming" rule contained in K.S.A. 44-508(f) provides in pertinent part:

The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

K.S.A. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.¹ In *Thompson*, the Court, while analyzing what risks were causally related to a worker's employment, wrote:

The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.²

But K.S.A. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's

¹ *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

² *Thompson v. Law Office of Alan Joseph*, 256 Kan. 36, at 46, 883 P.2d 768 (1994).

premises.³ Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.⁴

The Kansas Appellate Courts have also provided exceptions to the "going and coming" rule, for example, a worker's injuries are compensable when the worker is injured while operating a motor vehicle on a public roadway and the operation of the vehicle is an integral part or is necessary to the employment.⁵

In this instance the claimant, by her own admission, had left work for the day and was going home. The evidence established she was on a public sidewalk and not on her employer's premises. Likewise, there was no special risk or hazard identified regarding the sidewalk. Moreover, at the time of the accident claimant was not on a special errand as she was simply leaving work for the day. Consequently, K.S.A. 44-508(f) is applicable and claimant's accidental injury is not compensable.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.⁶

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Brad E. Avery dated May 5, 2006, is reversed.

IT IS SO ORDERED.

Dated this ____ day of July 2006.

BOARD MEMBER

c: Mitchell D. Wulfekoetter, Attorney for Claimant
Larry D. Karns, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

³ Id. at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area, controlled by the employer.

⁴ *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, 907 P.2d 828 (1995).

⁵ *Messenger v. Sage Drilling Co.*, 9 Kan. App.2d 435, 680 P.2d 556 *rev. denied* 235 Kan. 1042 (1984).

⁶ K.S.A. 44-534a(a)(2).